(12)

No. 96-270

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*,
Petitioners,

v.

GEORGE WINDSOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Supreme Court Rules, the Washington Legal Foundation ("WLF") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petitioners. WLF has requested consent to file this brief from all parties to the proceedings in the Third Circuit. As of the time this motion was printed, one party, Protective National Insurance Co. represented by Lawrence M. Silverman, Esq., has refused to consent to the filing of this brief. Furthermore, although WLF has received written consent from the petitioners and ten of the respondents, it has yet to receive responses from the remaining respondents.

WLF is a non-profit public interest law and policy center with thousands of supporters nationwide. WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses.

In particular, WLF has devoted substantial resources to curbing abusive litigation practices, excessive punitive damage awards, excessive attorneys' fees, and unwarranted expansion of tort liability by publishing monographs and similar educational materials on these subjects, and by filing *amicus curiae* briefs in appropriate cases. *See, e.g., Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Burlington Northern R.R. Co. v. Ford*, 504 U.S. 648 (1992).

WLF believes that the decision below is a radical departure from the established construction of Rule 23 of the Federal Rules of Civil Procedure in the context of class action settlements. The Third Circuit has enunciated a sweeping rule that would largely eliminate the use of Rule 23 to settle a wide variety of complex cases. If left intact, the decision will impose significant costs on businesses and citizens, lead to significant new controversies, and further burden the judicial system with litigation that otherwise could have been amicably resolved by the parties. Given this framework, WLF brings a broader perspective to the issues in this case and their potential effects on society than that presented by the parties in this action.

For the foregoing reasons, movant WLF respectfully requests that it be allowed to participate in this case and file the accompanying *amicus curiae* brief in support of petitioners.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

The decision below incorrectly holds that Rule 23 of the Federal Rules of Civil Procedure forbids certification of a settlement class unless the district court ignores the settlement itself and instead determines that the class can be certified for the trial of the matter. In thus extending its earlier decision in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995) (hereafter "*GM Trucks*"), the Third Circuit has overturned a

settlement that would have provided more than $1 billion in compensation to asbestos claimants and would have spared litigants and the court system the debilitating effects of litigating hundreds of thousands of asbestos claims. The nullification of this settlement is troublesome in its own right, but the more pressing concern to the Washington Legal Foundation ("WLF") is the extraordinary scope and reach of the Third Circuit's holding. Using an improper approach that interprets the Federal Rules as presuming that cases are meant to be tried rather than settled, the Third Circuit has enunciated a sweeping rule that would largely eliminate the use of Rule 23 to achieve class settlements of both mass tort litigations and other complex cases of immense magnitude.

The Third Circuit's approach contravenes Rule 23's language and structure. By emphasizing the absence of language expressly stating that the district court may consider the settlement when certifying a settlement class, the Third Circuit ignored both that the rule contains no language *forbidding* consideration of the settlement and that Rule 23(e) vests authority in the district courts to determine the circumstances in which class settlements should be approved. The Third Circuit (along with all other courts) interprets Rule 23 to permit the certification of "settlement-only" classes, and the logical corollary is that the district court may consider the settlement when addressing that certification issue. The Third Circuit's contrary construction not only ignores Rule 23's text and structure, but also contravenes the deeply rooted public policy favoring settlement. If a necessary premise of a class settlement is that the action would be maintainable in class form for litigation purposes, and if the settlement class is then certified but the settlement is disapproved or not consummated, the defendants would be left with a certified class action for all purposes. Such a potential outcome will dissuade most defendants from pursuing class settlements at all.

The Third Circuit's approach also is illogical, unworkable, and unnecessary in light of the purpose of Rule 23. Requiring district courts to ignore the settlement when certifying a class solely for settlement purposes would mean ignoring information that is highly pertinent to the application of the Rule 23(a) and (b) certification criteria. Moreover, the court of appeals' approach would require the district courts to address purely hypothetical issues concerning how the case would have been tried if it had not settled, leading to disapproval of settlements on grounds unrelated to whether the settlement treats the class members fairly. Properly construed, Rule 23 requires the district courts to address the certification of a settlement class by reference to the settlement itself, and thus to focus on those criteria which concern whether the settlement was reached through adequate representation of class members' interests and is otherwise fair.

The court of appeals proclaimed that by destroying the asbestos settlement, it was avoiding a "serious rend in the garment of the federal judiciary" and leaving "legislative solutions to legislative channels." Pet. App. 20a. This language of judicial restraint is wholly misplaced here, for the Third Circuit itself rested its decision on the policy judgment that if district courts are permitted to certify settlement classes by reference to the settlement, the "hydraulic pressures" of having to deal with mass litigation will lead them to approve inappropriate class settlements. Pet. App. 36a-37a (quoting *GM Trucks*, 55 F.3d at 799). Such a judgment is dubious on its face, but in any event is not for the courts to make in light of Rule 23(e)'s express grant of judicial authority to oversee class settlements. The Third Circuit's approach—which disregarded the decisions of virtually all other courts that have addressed the settlement class issue, overturned nearly three decades of established practice, and adopted an illogical rule of construction that encourages trial over settlement and demands hypothetical decision-

making over deciding the case actually at hand—does not preserve the institutional values of the judiciary but rather destroys them.

Once this Court rejects the Third Circuit's construction of Rule 23, the remaining issue will be whether the district court erred in certifying the settlement class in light of the settlement itself. This issue, which was not reached by the Third Circuit, should be reviewed under an abuse of discretion standard. Although WLF does not address here the specifics of the settlement class certification in this case, the district court's extensive factual findings on the key certification criteria and fairness issues should not be overturned unless clearly erroneous. This Court should reject the Third Circuit's sweeping suggestion that settlement class certification may be inherently precluded by certain "intra-class conflicts"—specifically, the potential conflict between claimants who are presently injured and those who may suffer injury in the future. Pet. App. 49a-51a. The identification of such *potential* conflicts within a class merely highlights an area for inquiry, and does not mean that *actual* conflicts exist. Consistent with the fact-specific nature of class action issues in general, the district courts should analyze the particular settlement and the processes by which it was brought about, as the district court did here.

The practical effects of failing to overturn the Third Circuit's decision would be monumental. Some of the largest, most intractable mass tort litigations in the country have been resolved through the use of settlement classes certified under Rule 23—not by reference to whether the class could be certified for litigation purposes, but rather by reference to the settlement itself. The same is true of settlements in numerous other class action contexts, such as antitrust, securities, consumer, and civil rights cases. Elimination of the settlement class option for resolving such vexing litigation crises would result in massive additional burdens and expense on both the court system and litigants. At the same time, claimants would be disadvantaged, for class settlements often resolve claims more fairly, quickly, and efficiently than other available processes. Finally, affirming the court of appeals' decision could spawn extensive new litigation as litigants in class actions that have already been resolved attempt to raise collateral attacks on those settlements. For all of these reasons, the Court should reverse the decision of the Third Circuit.

ARGUMENT

I. THE THIRD CIRCUIT ERRED IN HOLDING THAT RULE 23 FORBIDS CERTIFICATION OF A SETTLEMENT CLASS UNLESS THE SETTLEMENT IS IGNORED AND THE CLASS IS CERTIFIED FOR LITIGATION PURPOSES

The key holding below was that in determining whether to approve a proposed class settlement under Rule 23, a district court cannot certify the class "unless the case would have been 'triable in class form.'" Pet. App. 37a (quoting *GM Trucks*, 55 F.3d at 799). This approach precludes the district court from considering the settlement in addressing the class certification issue, *i.e.*, the court must pretend that the settlement does not exist and address the Rule 23(a) and (b)(3) class certification criteria "as if the case were going to be litigated." Pet. App. 36a, 39a. In reaching this conclusion, the court of appeals portrayed itself as the champion of judicial restraint: "Every decade presents a few great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other. This is such a case." Pet. App. 17a. Believing that it was avoiding "a serious rend in the garment of the federal judiciary," the court overturned the asbestos class settlement so as to "leave legislative solutions to legislative channels." Pet. App.

20a. Though appealing in general, these propositions are misplaced here. It is the Third Circuit that has exceeded proper judicial bounds by adopting an unnatural and strained construction of the text of Rule 23, ignoring longstanding precedent and practice, and fashioning a novel policy designed to reflect not the structure and purpose of the rule but rather the court's own hostility toward comprehensive class settlements in the mass litigation context.

A. The Third Circuit's Interpretation Contravenes The Language And Structure Of Rule 23

The decision below rests on a simplistic and fundamentally erroneous approach to the construction of Rule 23. The reason that a district court may not consider the proposed settlement when certifying a settlement class, the Third Circuit declared, is that the rule does not affirmatively say that the court may do so: "There is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes."[1] Pet. App. 38a (quoting *GM Trucks*, 55 F.3d at 799). But the court equally failed to identify language in Rule 23 providing that the settlement may *not* be considered in certifying a settlement class. That Rule 23 contains no explicit provision one way or the other does not mean that it must be presumed to withhold the power to take the settlement into account. No principle of interpretation requires each rule to itemize how it shall apply to the myriad situations which may confront the district courts. Far from prescribing guidelines for every conceivable situation, the Federal Rules necessarily are applied flexibly, taking into account the overarching command that they "shall be construed to secure the just, speedy, and

[1] The court of appeals also erred in asserting that considering the settlement means applying "liberalized" criteria. The same Rule 23(a) and (b) criteria are applied, but with different effect depending on the particular circumstances of each case (including whether a settlement has been reached). *See* pp. 14-15 *infra*.

inexpensive determination of every action." FED. R. CIV. P. 1.

Instead of searching for an express provision authorizing the consideration of the settlement when none was required, the Third Circuit should have assessed the plain meaning of the language in the context of Rule 23 as a whole, *see Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989), and adopted the most natural reading of the language, taking account of the rule's structure and purpose, *see Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 528-29, 533-34 (1984). Such an approach reveals that, far from prohibiting consideration of the settlement in the context of settlement class certification, Rule 23 can only sensibly be read to require it.[2] The rule mentions settlement only briefly and generally: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED. R. CIV. P. 23(e). The rule's silence on how this approval power should be exercised necessarily implies a grant of broad discretion to the district courts. For this reason, Rule 23(e) readily has been construed (including by the Third Circuit) to authorize courts to define the circumstances under which class settlements are proper, consistent with Rule 23's overall purpose and the Federal Rules in general.[3]

The absence of a provision explicitly authorizing consideration of the settlement when certifying a settlement

[2] Indeed, as set forth in the brief of Petitioners, the text of Rule 23 specifies that certification decisions should be made based on the actual posture of the case. *See, e.g.*, FED. R. CIV. P. 23(c)(1) (certification decision may be conditional and may be altered before decision on the merits).

[3] The Third Circuit has adopted a nine-part test for determining whether a class settlement should be approved. *See, e.g., GM Trucks*, 55 F.3d at 768-85, 806.

class is therefore irrelevant. The certification criteria in Rules 23(a) and (b) must be read in conjunction with Rule 23(e)'s settlement authority to permit the district courts to determine the settlement class certification in the context of the settlement itself. The Third Circuit itself acknowledged that the district courts' Rule 23(e) settlement approval power is not limited to cases in which a class has already been certified for litigation purposes under Rules 23(a) and (b). *See GM Trucks*, 55 F.3d at 794. The court agreed that Rule 23 permits certification of a "settlement class," *i.e.*, a procedure under which "[b]y conditionally certifying the class for settlement purposes only, the court allows the defendant to challenge class certification in the event that the settlement falls apart." Pet. App. 37a n.9. Because no provision explicitly authorizes the creation of settlement-only classes, that interpretation necessarily arises from a reading of Rule 23(e)'s settlement authority in conjunction with the remainder of the rule. Given this "practical construction" which "affords considerable economies to both the litigants and the judiciary and is also fully consistent with the flexibility integral to Rule 23," *GM Trucks*, 55 F.3d at 794, there is no reason for rejecting the natural corollary: if Rule 23 permits certification of a class for the specific and limited purpose of settlement, the certification criteria should be addressed in light of that specific and limited posture of the case. Nothing in the text or structure of Rule 23 provides a basis for construing the rule to permit the former, but not the latter. Not surprisingly, this is the interpretation adopted by virtually every court of appeals and district court to address this issue,[4] as well as by the MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.45 at 243 (Federal Judicial Center 1995). The Third Circuit's contrary interpretation—which paradoxically finds that settlement-only classes are permissible, yet asserts that "a class is a class is a class,"

[4] *See, e.g.*, cases cited at pp. 23-24 *infra*.

Pet. App. 38a (quoting *GM Trucks*, 55 F.3d at 799)—fails to give logical meaning to the text of Rule 23 as a whole and therefore should be rejected.

B. Consistent With Its Language And Purpose, Rule 23 Should Be Construed In Light Of The Deeply Rooted Public Policy Favoring Settlement

Petitioners' construction not only is the most natural reading of Rule 23's language, but also is powerfully supported by the public policy favoring the compromise of civil litigation. *See, e.g., McDermott, Inc. v. Amclyde & River Don Castings Ltd.*, 511 U.S. 202, 114 S. Ct. 1461, 1469 n.22 (1995) ("public policy wisely encourages settlements"); *Williams v. First National Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts (*Hennessy v. Bacon*, 137 U.S. 78); and, presumptively, the parties to the compromise in question possessed the right to thus adjust their differences."). This Court has often directed that any ambiguity in the language of statutes and rules must be construed in light of presumptions derived from long-standing policies and practices. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196, 115 S. Ct. 797, 803 (1995) (absent clear statement to the contrary, Federal Rules of Criminal Procedure will not be construed to preclude waiver of legal rights in view of the "background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties"); *Landgraf v. USI Film Products*, 511 U.S. 244, 255-57 (1994) (declining to construe ambiguous statute to impose liability for conduct prior to the effective date in light of the strong presumption against retroactivity). In the same vein, the language of Rule 23 should be construed in light of a presumption that federal procedures should be applied in ways that facilitate settlement or allow parties to narrow issues by agreement. Because Rule 23's language does not clearly mandate a different result, it should be construed to

permit a district court to refer to the settlement itself when deciding whether to certify a settlement class.[5]

The Third Circuit has impermissibly reversed this presumption. By forbidding settlements unless the case could have been fully litigated as a class action, the Third Circuit has treated settlement as a disfavored mechanism.[6] Under this construction of Rule 23, most defendants will refuse even to consider a class settlement. Every class settlement submitted to a district court for approval will presuppose a stipulation *by the defendants* that the class can be certified for litigation under Rules 23(a) and (b). If the class is then certified but the settlement

[5] The Third Circuit's concern about transforming the courts into a "mediation forum," *GM Trucks*, 55 F.3d at 799, ignores the reality that settlement is the predominant mechanism for resolving civil litigation. *See McDermott*, 114 S. Ct. at 1469 n.22 (less than five percent of federal cases end in trial, and settlement is the primary means of resolution). Settlement is equally critical for the resolution of class actions as well. *See* Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Changes*, 71 N.Y.U. L. REV. 74, 112 (1996) (recent study found that 84% of cases in which a class was certified ended in settlement, with about half of those settlements and 39% of all certified class actions involving a class certified for settlement purposes only).

[6] In doing so, the Third Circuit also contradicted its own doctrine that one consideration in determining the fairness of a settlement under Rule 23 is the risk of maintaining class action status. *See GM Trucks*, 55 F.3d at 785, 817. This consideration makes sense only if Rule 23 permits a class to settle with the defendants in circumstances in which there is uncertainty whether a class action can be maintained. If, on the other hand, the class itself cannot be certified for settlement purposes absent an affirmative finding that the case *is* triable in class form, the "risk of maintaining class status" factor can never arise. If the settlement class is certified as proper for litigation purposes, the risk of non-certification becomes moot; if the settlement class is rejected because the class could not be certified for litigation purposes, this risk factor again is moot and indeed the court will never reach the fairness of the settlement. This is one of many logical inconsistencies inherent in the Third Circuit's ruling. *See* pp. 12-15 *infra*.

for any reason is not approved by the court or otherwise is not consummated, the court will have found that the class action is maintainable under Rules 23(a) and (b) without regard to the settlement. The defendant will be locked into a class action that it otherwise adamantly would have opposed.[7] The mere possibility of such an outcome will discourage defendants from considering a class settlement at all, thus destroying the very purpose of recognizing "settlement classes."[8] These anti-settlement results are wholly inconsistent with public policy and the purposes of the Federal Rules and Rule 23 in particular.[9]

[7] It is no answer that a "settlement class" is only a conditional certification and that the defendant reserves the right to contest class certification if the settlement is not consummated. If the district court makes the requisite affirmative findings that the class can be certified as if the case were going to be litigated, *see* Pet. App. 36a, the district court hardly can cavalierly ignore or overturn those findings if the settlement falls apart and the matter proceeds in litigation. Nor is it practical for a defendant to advocate the factual and legal basis for certifying a class for litigation purposes when the context is settlement, and then to switch sides and attack the certification unequivocally in the litigation context.

[8] *GM Trucks* reasoned that "a defendant considering a settlement may resist agreeing to class certification because, if the settlement negotiations should fail, it would be left exposed to major litigation," and that "settlement classes may reduce litigation costs by allowing defendants to stipulate to class certification without forfeiting any of their legal arguments against certification should the negotiations fail." 55 F.3d at 790. The court of appeals did not acknowledge that its decision below negated this central purpose of the settlement class mechanism.

[9] Even where settlements are approved under the Third Circuit's approach, defendants in general will be disadvantaged because each settlement approval will create a new precedent in support of maintaining a class action for litigation purposes. If settlements occurred with regularity under this approach, the inevitable effect would be a shift in doctrine toward much more liberal class certification.

C. The Third Circuit's Construction Of Rule 23 Is Internally Inconsistent And Creates An Unnatural And Unworkable Scheme That Is Not Compatible With The Structure Or Purpose Of The Rule

For the reasons explained above, the position advanced by Petitioners harmonizes Rule 23(e) with Rules 23(a) and 23(b) and respects the strong public policy favoring settlement. In contrast, the Third Circuit's strained reading of Rule 23 contains so many logical inconsistencies and creates so many practical difficulties that it should be rejected as implausible. To require a district court to pretend that a settlement does not exist, when the very inquiry at hand is whether to certify a class solely for settlement purposes, "would require a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class." *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996). For example, even the Third Circuit acknowledged that, "[c]ertainly, evaluating the settlement can yield some information relevant to the adequacy of representation determination under 23(a)(4)." *GM Trucks*, 55 F.3d at 795. Indeed, the adequacy of representation inquiry can be made more concretely in the context of a settlement, where the *actual* results obtained by the putative class counsel can be assessed, than in the context of litigation, where the inquiry is inherently predictive in nature.

By requiring the district courts to ignore the settlement and instead to render findings on the hypothetical question of how the case would proceed if it were litigated, the Third Circuit has ignored the admonition that, in construing Rule 23, courts should disregard "interests that may be theoretic rather than practical." *Amendments to Rules of Civil Procedure, Rules Advisory Committee Notes to Amended Rule 23*, 39 F.R.D. 69, 104 (1966); *cf. Landgraf*, 511 U.S. at 258 n.29 ("Our orders approving amendments to federal procedural rules reflect the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case."). For example, the Third Circuit argued that the existence of important state law questions prevented a finding of "commonality" under Rule 23(a)(2) or of "predominance" under Rule 23(b)(3) because of the difficulties of determining such questions in a nationwide class litigation. *See* Pet. App. 43a, 48a. But if class certification is addressed specifically in the context of a settlement, it does not matter whether it would be practical to try the case as a national class action. The settlement eliminates the need to resolve those state law questions. The complexity, uncertainty, and expense of resolving this type of difficult litigation issue are compelling reasons for the parties to compromise their rights, and should not be used (as under the Third Circuit's anomalous approach) as reasons for disallowing a class settlement.

As another example, the Third Circuit insisted that a settlement class satisfy Rule 23(b)(3) as if the case were to be litigated. *See* Pet. App. 36a, 39a. But criteria such as the difficulties likely to be encountered in the management of a class action, *see* FED. R. CIV. P. 23(b)(3)(D), have little relevance when the decision is solely whether to resolve the case rather than to litigate it. Moreover, such case management issues will not even be presented to the district court in a proper adversarial form. If the context is settlement, no one will have proposed a plan for managing the action as class form, addressed the discovery and trial issues expected to arise along the way, or otherwise fully briefed the considerations that would inform the litigation class inquiry as opposed to the settlement class inquiry. By mandating that the district courts address such hypothetical and unripe litigation inquiries when the limited context at hand is settlement, the Third Circuit's construction of Rule 23 produces results that are contrary to common sense.[10]

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[10] Many other logical inconsistencies or absurd outcomes are created by the Third Circuit's approach:

A more sensible and consistent interpretation is that when a court exercises its settlement approval authority under Rule 23(e), it should address the class certification issue specifically with respect to the settlement at hand. The Rule 23(a) and (b) criteria are intended to address two basic concerns: judicial economy and fairness. *See General Telephone Co. v. Falcon*, 457 U.S. 147, 157-58

• For example, even if there were no objections to a proposed settlement that the district court agreed was fair, the court nonetheless would be *required* to disapprove the settlement if it could not find that the class would have been maintainable for litigation purposes. Such an anomalous result is contrary to the well-established principle that litigants are free, and indeed encouraged, to resolve their disputes.

• The Third Circuit's test—is the case "triable in class form"?—is presented as an all-or-nothing conclusion that is divorced from the realities of a class action. In the litigation context, the district court may certify a class conditionally, and await the progress of the case before finally deciding the class certification issues. *See* FED. R. CIV. P. 23(c)(1) (certification order may be conditional and may be altered or amended before judgment). Or the district court may conclude that the propriety of a class certification for trial purposes is uncertain, and authorize discovery to address that issue. Under the Third Circuit's approach, any uncertainty concerning whether the case is "triable in class form" presumably must lead to a refusal to certify the settlement class. Settlements therefore will be disapproved in cases in which a class ultimately might have been certified.

• In still other cases, the district court may conclude that the class action is maintainable for certain issues, but not for others. *See* FED. R. CIV. P. 23(c)(4); Pet. App. 47a (citing many cases in which courts have only partially certified common issues). Although the court of appeals did not address this question, its opinion suggests that if the class action could not be maintained for all purposes, a settlement purporting to resolve all claims between the class and the defendants could not be approved because the class representatives could not purport to represent the class for purposes of those issues (such as individual damages) not suited for class treatment The result would be to eliminate class settlements in virtually any case involving individual damage issues.

n.13 (1982). Those considerations which are addressed to practical issues such as the efficiency and manageability of the class for purposes of litigation need not stand in the way of certifying a settlement-only class, for such concerns generally are eliminated by the settlement itself.[11] In contrast, the core fairness concerns of the Third Circuit—that "Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiffs' and counsel's ability to fairly and adequately protect class interests," *GM Trucks*, 55 F.3d at 799, and that "collusion, inadequate prosecution, and attorney inexperience are the paramount concerns in pre-certification settlements," *id.* at 795—will be addressed directly by the district court both in examining the adequacy of putative class counsel's representation of the settlement class and in evaluating the fairness of the settlement itself. Construed in this common sense fashion, Rule 23 amply protects the class members' interests in fairness and adequate representation, without requiring the district courts to pretend that the settlement does not exist.

D. The Court Of Appeals Has Abdicated Judicial Responsibility In The Name Of Judicial Restraint And Has Substituted Its Own Policy Judgments For Those Already Embodied In Rule 23

The court of appeals ultimately seems to have concluded that the district courts simply cannot be trusted to carry

[11] There is no reason why the presumption that parties may voluntarily compromise their legal rights and settle their disputes, *see, e.g., Mezzanatto*, 115 S. Ct. at 802, *Williams*, 216 U.S. at 585, should not apply to those issues that relate to the efficiency and manageability of a class action (as opposed to fairness and adequacy of representation issues). The court's independent concern about burdens on the judicial system can be addressed by examining any burdens associated with administering the settlement; the burdens that would have resulted in the absence of a settlement are eliminated because the settlement ensures that litigation will not go forward.

out their Rule 23 responsibilities: "To allow lower standards for the requisites of the rule in the face of the hydraulic pressures confronted by courts adjudicating very large and complex actions would erode the protection afforded by the rule almost entirely." *GM Trucks*, 55 F.3d at 799. The Third Circuit thus presumed that if district courts are allowed to consider the settlement when certifying a settlement class, their desire to clear crowded dockets will prove overwhelming and thus impel them to approve unfair or improper class settlements. This proposition is not supported by any evidence, but in any event is irreconcilable with Rule 23(e), which vests in the district courts the power to approve or disapprove settlements. The Third Circuit's concern about "hydraulic pressures," whether or not plausible, cannot provide a basis for a judicial rewriting of Rule 23.

It is ironic that the Third Circuit, while cloaking itself in the mantle of judicial restraint, decided to rest its decision on an essential policy judgment about judicial competence. The very structure and content of the Third Circuit's opinions reflect a determination to get to the bottom of the *policy* implications of the class settlement issue. Having engaged in this policy debate with itself, the court of appeals became so convinced of the need to avoid these presumed "hydraulic pressures" that it disregarded the holdings of virtually every other federal court that has addressed the settlement class issue; overturned nearly three decades of established practice; and adopted an illogical rule of construction that encourages trial over settlement and demands hypothetical decisionmaking over deciding a case based on the circumstances at hand. Far from preserving the institutional values of the judiciary, such an approach contravenes them. The court of appeals should have limited its focus to the rule itself, which grants ample authority to the district courts to address the pertinent considerations that affect a proposed class settlement.

This Court also should dismiss the Third Circuit's suggestion that the district court's certification of the settlement class and approval of the settlement somehow constituted an improper judicial exercise of legislative powers. *See* Pet. App. 58a. Although Congress might choose to act, it hardly is the usual forum for deciding the outcome of civil disputes, however complex. These asbestos claims are pending in the courts. Resolutions of one kind or another must be reached, whether in a class action or individual adjudications. The oversight of negotiated settlements between litigants is a long-accepted part of the judicial function, and here is based on an express delegation in Rule 23(e). The complexity of the claims and the sheer number of the claimants may affect the exercise of that function, but they do not transform it into impermissible social legislation. The Third Circuit's "hope" that its opinion will galvanize Congress into action, *see* Pet. App. 59a, is likely to be in vain, but in any event is not a proper basis for abdicating judicial power. The use of Rule 23 to achieve massive class settlements merely reflects the need for the courts to apply their rules to novel situations created by the inundation of the judicial system with lawsuits of a constantly expanding number, type, and scope. Construing the Federal Rules in the context of complex new litigations, and particularly interpreting them to promote opportunities for settlement, is well within the judiciary's delegated power and indeed is an integral part of the courts' responsibility.

II. IF THIS COURT ADDRESSES WHETHER THE DISTRICT COURT PROPERLY CERTIFIED THE CLASS IN LIGHT OF THE PARTICULAR SETTLEMENT IN THIS CASE, IT SHOULD EMPLOY AN ABUSE OF DISCRETION STANDARD TO ANALYZE THE DISTRICT COURT'S FACTUAL FINDINGS AND SHOULD REJECT THE THIRD CIRCUIT'S SWEEPING SUGGESTION THAT CERTAIN TYPES OF "INTRA-CLASS CONFLICTS" MAY INHERENTLY PRECLUDE SETTLEMENT CLASS CERTIFICATION

Based on its erroneous premise that "a class is a class is a class," the court of appeals decided only that the class in this case could not be certified for litigation purposes, and therefore that it could not be certified for any purpose. If this Court reverses on that issue, the remaining question will be whether the district court correctly certified the class in light of the settlement itself. The Third Circuit did not reach this question. Because the question depends on an analysis of the district court's factual findings relating to a variety of factors, the proper standard of review is abuse of discretion. "The certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court." *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). In this case, the district court conducted extensive proceedings directed toward a host of issues, including numerous attacks on class certification and on the fairness of the settlement. *See* Pet. App. 23a-30a (summarizing proceedings in the district court); Pet. App. 269a. These proceedings included discovery and a five-week evidentiary hearing. *See* Pet. App. 29a (18 days, 29 witnesses). In certifying the class and approving the settlement, the district court made more than 300 findings of fact. *See* Pet. App. 103a-223a. Thus, although WLF does not address here the specific issues concerning the certification of the settlement class (issues addressed in Petitioners' brief), the thoroughness of the district

court's examination of both the class certification criteria and the fairness considerations certainly provides a strong foundation for upholding that decision.

If this Court addresses whether the certification decision was proper in light of the settlement itself, it should reject the indiscriminate statements in the Third Circuit's opinion which might be read to suggest that supposed "intra-class conflicts" would preclude settlement class certification, not only here but in many other cases as well, even if the settlement is taken into account. In particular, this Court should reject the Third Circuit's far-reaching discussion concerning the "adequacy of representation" criterion under Rule 23(a). The Third Circuit stated that "serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement." Pet. App. 49a. Briefly addressing the settlement, the court reasoned that the settlement "makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others. . . . In short, the settlement makes numerous decisions on which the interests of different types of class members are at odds." Pet. App. 49a. The Third Circuit was especially concerned with a perceived conflict between the interests of the presently injured plaintiffs and those who may become ill in the future: "[T]he interests of the exposure only plaintiffs are at odds with those of the presently injured: the former have an interest in preserving as large a fund as possible while the latter seek to maximize front-end benefits." Pet. App. 20a. As a result, "presently injured class representatives cannot adequately represent the futures plaintiffs' interests and vice versa." Pet. App. 50a-51a.

To the extent the court intended to suggest that a settlement class containing both types of plaintiffs can never be certified, that suggestion must be rejected. There is no

inherent, irresolvable conflict within such a class.[12] The Third Circuit's observation that different class members might prefer different remedies hardly is surprising, for a certain degree of conflict among class members may always be present, if for no other reason than that persons tend to prefer the maximization of their own benefits without regard to others similarly situated. Every class settlement is a compromise, not only between plaintiffs and defendants, but also within the plaintiff class itself. For that very reason, Rule 23 imposes requirements concerning matters such as notice and opt-out rights. *See* FED. R. CIV. P. 23(c)(2). In addition, the district court is required to examine the circumstances of the individual settlement in view of possible conflicts, and then to decide whether the settlement was arrived at through representatives who adequately protected the interests of class members and whether it otherwise is fair.[13]

[12] In the proceedings below, certain objectors asserted that some members of the class lacked standing to assert claims because they had not suffered any actual injuries, and therefore should not have been included within the class. The Third Circuit did not reach that issue, *see* Pet. App. 19a, it is not before this Court, and WLF takes no position on it here. *See* Brief *Amicus Curiae* of the Washington Legal Foundation in Support of Petitioner, *Metro-North Commuter R.R. Co. v. Buckley*, No. 96-320 (arguing that plaintiff manifesting no physical effect from exposure to asbestos and alleging only a general anxiety concerning his future health should not be permitted to assert a claim under the Federal Employer's Liability Act).

[13] The Third Circuit stopped short of suggesting that such a settlement class could never be certified, appearing to recognize the possibility of "structural protections to assure that differently situated plaintiffs negotiate for their own unique interests." Pet. App. 51a. Even that qualification was too limited, however, for nothing in Rule 23 specifies that any particular "structural protection" (such as sub-classes) is required to vindicate the class members' interests. In overseeing the settlement negotiations, or at least in approving the compromise reached therefrom, the district court should be concerned with the actual adequacy of representation of the class members' interests, not with the formality of whether any particular procedural device was employed.

The most striking thing about the Third Circuit's "conflict" analysis is that it was entirely divorced from the specifics of the settlement in *this* case. Having identified *potential* conflicts between presently injured plaintiffs and those whose exposure to asbestos may give rise to future injury, the court of appeals reached its decision without determining whether such conflicts actually exist. In this case, the district court heard extensive testimony and argument and then made detailed findings that rebutted these concerns identified by the Third Circuit. *See, e.g.*, Pet. App. 175a, 179a-204a. In other major class action cases, district courts similarly have certified a settlement class including different types of plaintiffs after analyzing the particular facts and circumstances involved. *See, e.g., In re Agent Orange*, 996 F.2d 1425, 1428-29 (2d Cir. 1993); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. 1994). Such findings should be upheld unless they constitute an abuse of discretion.

For similar reasons, this Court should decline to accept the Third Circuit's intimations that the supposed intra-class conflict between these different types of plaintiffs may prevent a finding of typicality, predominance, and superiority. When these factors are considered in light of the settlement itself, they either are readily satisfied (to the extent that they relate to practical issues such as the manageability of the class litigation) or tend to merge into the fairness issue that is central to the adequacy of representation factor. *See General Telephone Co.*, 457 U.S. at 157-58 n.13. The district courts should avoid bright-line presumptions that potential intra-class conflicts have improperly infected the settlement.[14] Instead, they should

[14] The Third Circuit similarly went much too far in its brief analysis of the "superiority" prong of the Rule 23(b)(3) inquiry. The court stated:

> [I]t is obvious that if this class action settlement were approved, some plaintiffs would be bound despite a complete

analyze the particular settlement and the processes by which that settlement was brought about, just as the district court did in this case.

III. THE THIRD CIRCUIT'S HOLDING THREATENS TO PRECLUDE FUTURE CLASS ACTION SETTLEMENTS IN BOTH PERSONAL INJURY CASES AND MANY OTHER CONTEXTS, THUS ELIMINATING THE PRINCIPAL MECHANISM FOR THE FAIR AND EFFICIENT RESOLUTION OF MASS LITIGATION THAT HAS BEEN USED SUCCESSFULLY FOR NEARLY THREE DECADES

The practical effects of the Third Circuit's decision are staggering. If "a class is a class is a class," then *no* settlement can be reached where any impediment exists to certifying the class for litigation purposes. The Third Circuit would preclude use of the settlement class device precisely where such classes are "most useful": those "cases presenting the most unwieldy substantive and procedural issues, i.e., those diversity cases in which plaintiffs from many states are confronted with different defenses, differing statutes of limitations, etc." *GM Trucks*, 55 F.3d at 799. If applied across the nation, this approach would radically alter judicial practice over the past three decades, flooding the courts with additional cases and stalling indefinitely the resolution of plaintiffs' claims. This Court should not permit the elimination of this critical safety valve in the judicial system.

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lack of knowledge of the existence or terms of the class action. It is equally obvious that this situation raises serious fairness concerns. Thus, a class action would need significant advantages over alternative means of adjudication before it could become a 'superior' way to resolve the case. . . . These advantages are lacking here. Although individual trials for all claimants may be wholly inefficient, that is not the only alternative. A series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23, would seem preferable.

Pet. App. 57a. This analysis not only ignores contrary district court findings in this very case, *see* Pet. App. 227a-228a, but also undercuts Rule 23 entirely by suggesting that if claimants without actual notice may be bound (something inherent in large class actions), then any alternative form of adjudication may be presumed to be "superior." Moreover, the Third Circuit's reasoning is nonsensical on its own terms. If the concern is that individual claimants must be given an opportunity to control their own claims and to avoid any risk of being bound to a settlement without actual notice, then it hardly would be "superior" to relegate claimants to a series of statewide class actions that would suffer from the same alleged defects.

The "settlement class" device has been used to settle some of the most complex mass tort litigations that have inundated the judicial system. For example:

- A class settlement was reached covering all persons exposed to Agent Orange, including those who had not yet manifested injury. As of 1992, the settlement had disbursed more than $146 million and processed some 60,000 claims. *See In re Agent Orange*, 996 F.2d at 1428-29 (reprinting terms of settlement and recounting procedural history).

- In 1989, the Fourth Circuit affirmed the certification of a settlement class in the Dalkon Shield cases, resolving the claims of "literally hundreds of thousands of claimants," including both present and future claims. *See In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989).

- In *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 158-60 (S.D. Ohio 1992), the court approved the certification of a class for the settlement of approximately 100,000 claims, present and future, related to defective heart valves.

- The Northern District of Alabama approved a settlement resolving the claims of hundreds of thousands of recipients of silicone gel breast implants, including women who allege illnesses as well as women who may become ill in the future. *See In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. 1994).

As these cases illustrate, Rule 23 "settlement classes" have been used to resolve some of the largest and most intractable mass tort problems in the country by comprehensively settling all claims of an enormous number of claimants. The Third Circuit's approach likely would have prevented such settlements, for the courts in those cases focused on the settlement itself in certifying the class, rather than on the hypothetical question whether the action could be maintained in class form for litigation purposes. The destructive impact of the Third Circuit's opinion, moreover, would not be limited to mass tort cases. Class settlements have been reached in a wide variety of contexts, including antitrust, securities, consumer, and civil rights cases, in which settlement-only classes were certified in situations in which a litigation class might not have been certified. *See, e.g., In re Chicken Antitrust Litig.*, 560 F. Supp. 957, 960-61 (N.D. Ga. 1980) (antitrust case affecting rights of over 200,000 persons), *aff'd*, 669 F.2d 228 (5th Cir. 1982); *Malcham v. Davis*, 761 F.2d 893 (2d Cir. 1985) (securities), *cert. denied*, 475 U.S. 1143 (1986); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982) (racial and sexual bias action on behalf of San Francisco police department), *cert. denied*, 459 U.S. 1217 (1983); *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301 (D. Mass 1987) (fraud case addressing claims of 50,000 customers); *In re Marine Midland Motor Vehicle Leasing Litig.*, 155 F.R.D. 416 (W.D.N.Y. 1994) (claims of 50,000 persons based on RICO violations in leasing practices).

Overturning the widespread and longstanding judicial construction of Rule 23 that enabled these and many other class settlements to occur would have a devastating effect on the court system, claimants, and defendant businesses. Without the settlement class option, federal judges would lose one of the few available mechanisms for forging solutions to these exceptional litigations. When one compares the alternatives, settlement class actions resolve claims

more fairly, quickly, and efficiently, and with greater protections for claimants, than do the alternative procedures which—until this settlement—have grossly failed to resolve asbestos claims. For example, the Judicial Conference Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist found grave problems with the tort system's handling of asbestos claims: "[D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether." *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* (March 1991), p. 3.[15]

Even beyond these problems of extraordinary expense for litigants and extraordinary burdens on the judicial system, the Third Circuit has ignored reality in believing that alternatives to class settlements will provide greater fairness to claimants. *See* Pet. App. 57a. Settlement classes are subject to substantial protections, in the form of judicial supervision of the settlements and other pro-

[15] The district court made similar findings in this very case: "[T]he proposed settlement will provide class members with fair compensation for their claims while reducing the delays and transaction costs endemic to the asbestos litigation process as it occurs presently in the tort system. . . . This Court has also made findings concerning how asbestos victims presently fare in the tort system. New filings continue unchecked, there is much uncertainty as to liability and verdict results, claims are often resolved only after long delays, transaction costs are high, and victims receive only a fraction of the funds expended. . . . The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease." Pet. App. 227a-228a, 240a, 270a (citations omitted).

cedural protections in Rule 23, as compared to the complete absence of structural protections in other tort system settlements. For example, most asbestos cases in the tort system are resolved not through individual trials or settlements, but instead as part of group settlements of hundreds or thousands of cases filed by the same plaintiffs' attorney.[16] Having reached such multi-claim settlements, the plaintiffs' lawyer often then unilaterally allocates the settlement sum among his many clients.[17] There is no judicial supervision of the group settlement amount.[18] There is no supervision of counsel's allocation of the settlement among the numerous claimants.[19] And there is no review of the reasonableness of the fees kept by the plaintiffs' attorney.[20] In short, because settlement class actions provide claimants with far greater safeguards than other available forms of adjudication in the tort system, both for asbestos cases and other types of claims,[21] the Court

[16] *See, e.g.*, JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 74-75 (1995).

[17] *See, e.g.*, WEINSTEIN, at 74-75; Deborah R. Hensler, *Resolving Mass Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 102 ("In asbestos litigation . . . [b]atch settlement sessions settle hundreds of cases in a single week, often using only crude categorization schemes and rules of thumb to determine levels of compensation.").

[18] Moreover, individual claimants are "rarely, if ever, included in the settlement discussions" with the defendant. Hensler, *supra* note 17, at 97.

[19] Nor is it realistic to think that individual clients can refuse to accept the amount allocated by their counsel. *See* WEINSTEIN *supra* note 16, at 75 ("I have yet to see plaintiffs successfully ignore their attorney's advice to settle an asbestos or DES case.").

[20] For example, Judge Weinstein observed that "[a]n audit of the Baltimore asbestos cases," which were settled on a group basis, "might show a net fee on the order of thousands of dollars per hour." WEINSTEIN, *supra* note 16, at 74 (citation omitted).

[21] The lack of structural protections and the individual claimants' lack of involvement are so severe that, in one recent situation, a plaintiffs' asbestos attorney simply misappropriated a group settlement payment of over $1 million; his 900-odd clients never realized that they should have received those funds; and the misappropriation only came to light when another attorney later informed a disciplinary board. *See In re Asbestos Prods. Liab. Litig.* MDL 875 (E.D. Pa. Oct. 31, 1994) (order voiding agreement to substitute counsel).

should be especially wary of [illegible]arding this critical tool of case management and resolution.

Moreover, adopting the Third Circuit's rule could prove enormously detrimental to American businesses. The vast number of claims, coupled with great uncertainty regarding potential liability, poses a significant threat to the viability of many companies facing mass tort litigation. The district court recognized this problem in the context of the asbestos cases: "[F]acing enormous liabilities and overwhelming costs to defend thousands of asbestos-related claims, many asbestos producers were on the road to bankruptcy, including a number of companies previously considered to be immune from financial difficulty." Pet. App. 107a. Similar problems have been recognized in other mass tort cases. *See, e.g., In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989) (explaining how the burden of litigation arising out of the Dalkon Shield cases forced A.H. Robins into Chapter 11 bankruptcy). Class action settlements, such as the one rejected by the Third Circuit, provide businesses with a critical option for resolving claims without having to resort to bankruptcy. Even for companies that may not be on the brink of bankruptcy, settlements that comprehensively resolve broad classes of claims enable the companies to establish the boundaries of their liabilities and structure their finances accordingly. As the district court noted below, "the Stipulation itself will, if approved, significantly enhance the financial condition and prospects of[] CCR defendants . . . because it will remove 'uncertainty which adversely affects these companies' ability to access the capital markets, to raise debt and equity, or to attract people, or to compete in the

marketplace . . . .'" Pet. App. 172a (quoting expert testimony).

Finally, affirmance of the Third Circuit decision not only would thwart future class settlements, but might also cause litigants to try to dismantle many of the class settlements that already have been reached. The damage of such a result on businesses, claimants, and the judiciary would be almost incalculable. Accordingly, this Court should reject the Third Circuit's decision in order to avoid articulating a sweeping rule that not only would preclude future class settlements in the most vexing mass litigation scenarios, but also would threaten to generate collateral litigation concerning the settlements that already have resolved enormous controversies such as the cases involving Agent Orange, Dalkon Shields, and breast implants.[22]

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[22] In this regard, WLF disagrees with the statement in the Petition for Certiorari that "[i]f the Third Circuit is right and its approach ultimately prevails nationwide, parties that choose to enter into settlements in reliance on the decisions of those other courts of appeals eventually will see those settlements overturned." Pet. at 2. Even if those prior courts adopted erroneous interpretations of Rule 23, that type of legal error does not provide a basis to upset a class settlement on collateral attack. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."). At a minimum, therefore, the Court should leave no room for a suggestion that previously approved settlements could be undone through collateral attack or otherwise.

CONCLUSION

For the foregoing reasons, WLF respectfully requests that this Court reverse the decision of the Third Circuit.

Respectfully submitted,

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